

of the plaintiff, upon the verdict of a jury, in an action brought in that Court to recover damages for the loss of the plaintiff's horse, in the circumstances set out below.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and CLUTE, J.

W. B. Northrup, K.C., for the appellants.

E. G. Porter, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O.:—The female appellant conducts an ice business, which is managed by her son, the other appellant, and for the purpose of the business they cut ice in the Bay of Quinté. There is a conflict of testimony as to the area of the opening made in the process of cutting; but it was at least 150 feet long and 8 or 9 feet wide; and the appellants failed to provide the protection around it required by sec. 287 of the Criminal Code. A horse of the respondent which was being driven by him, attached to a sleigh in which the respondent and a man named McConnell sat, and in which there were a number of empty milk-cans, ran away and in the course of his flight broke through the thin ice which had formed over the hole, and was drowned. The bay when frozen over is used as a means of travelling from Belleville to the county of Prince Edward; and the respondent was driving across the bay for the purpose of getting a supply of milk from farmers in that county. There was a beaten track which was used in crossing the bay, and the respondent was driving on it when his horse ran away and ultimately came to the hole in the ice, which was distant about 150 feet from the travelled way.

The respondent brings his action to recover damages for the loss of his horse, and claims to recover on two grounds: (1) that the hole in the ice, insufficiently guarded as it was, constituted a nuisance in the highway which he was lawfully using, and that the loss of the horse was due to the existence of the nuisance; (2) that the appellants were guilty of a contravention of sec. 287 in not protecting the hole as that section requires, and that the loss of the horse was due to the failure so to protect it.

The contention of the appellants is, that the hole in the ice did not constitute a nuisance, because of its distance from the travelled way; that no action lies for the failure to provide the protection which sec. 287 requires; and that the proximate cause